1977

Jack H. Pitts and Sandra J. Pitts v. Kimberly B. McLachlan and Craig McLachlan : Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

JACK H. PITTS and SANDRA J. PITTS,	:	
Plaintiffs and Appellants,	:	
vs.	:	No. 15010
KIMBERLY B. McLACHLAN and CRAIG McLACHLAN,	:	
Defendants and Respondents.	:	

PETITION FOR REHEARING

Appellants make this Petition for Rehearing for the reason that fundamental errors were committed by the Court, both in arriving at its decision and in the preparation of its opinion.

In the third paragraph of the opinion, in referring to the Uniform Real Estate Contract of October 7, 1975, the opinion states:

> "It was the type of contract that may be treated as a mortgage at the option of the seller, when and if the buyer defaults in its terms. The plaintiffs chose that procedure and foreclosed against the McLachlans * * *."

The contract is unusual, in that it provides for a small down payment, then for a payment of $2,000 the next month, then for two monthly payments of $210, and then for payment of the entire balance of $31,333.57 on the next month or January 8, 1976 (R. 4). It is true that Paragraph 16 of the contract provides the sellers with three options, namely to seek to forfeit the contract as liquidated damages under Option A, to sue for the delinquent installments under Option B, or to declare the entire unpaid balance due and payable, treat the contract as a note and mortgage and pass title to the buyer subject thereto under Option C.

The plaintiffs clearly elected to sue under Option B and brought action for the payment due January 8, 1976, plus taxes, interest and attorneys' fees, after giving credit for the previous installments paid. (It will be noted that the contract erroneously uses the balance of $31,333.57 as the approximate amount of the installment due on or before January 8, 1976, failing to deduct, in the recitations of the contract, the payment of $2,000 due on October 28, 1975.) (Amended Complaint, R. 9, ¶ 4) There is not one word in the Complaint (R. 2 and 3) or the Amended Complaint (R. 9 and 10) about treating the contract as a mortgage and bringing action to foreclose.

The Motion for Summary Judgment (R. 13-14) states the basis of the judgment to be obtained and refers to it as:

> "The due date of the payment of the balance owing is plain from the contract and from the affidavit * * *."

The affidavit offered as the basis for the summary judgment likewise simply refers to the payments made as required by the contract, recognizes the $2,000 which was paid on December 15 instead of October 28, 1975, and calculates the balance of the balloon payment due January 8, 1976 to be $29,333.57. Again, there is no statement referring to the passage of title or the foreclosure of a mortgage. (R. 15)

This error of the Court in considering this to be an action where the sellers passed title and sought to foreclose as a mortgage is fundamental, because the case deals with the matter of where title stood and in whose name. The defendants-respondents took the position that title passed to the buyers jointly and equally simply by the entry of the judgment. That is the basis of the action filed by the creditors of Craig McLachlan. Appellants sought correction of the summary judgment, not for the purpose of undoing the passage of title effectuated by a mortgage foreclosure election, but to clarify the situation and to eliminate the question of whether title passed in a manner contrary to the recitations of the contract itself.

Appellants did not and do not concede that title passe and cited authorities that this issue must be determined favora to passage of title in a proceeding designed to that specific objective. Houston Oil Co. v. Randolph, 251 S.W. 794, 28 A.L.R. 926 (Tex. 1923), (cited at page 15 of appellant's Brief); Adams v. Davies, 107 Utah 579, 156 P.2d 207, 159 A.L.R. 852; and 46 Am.Jur.2d, Judgments, ¶ 390 and 393 (cited at pages 4 and 5 of appellant's Reply Brief).

In that same third paragraph of the opinion, the Court makes another mistaken assumption in the last sentence of that paragraph, where it states:

> "The property then appeared as of record in the names of Kimberly B. and Craig McLachlan (as evidenced later in the Sheriff's documents at execution sale)."

The execution directs the Sheriff to sell:

> "* * * the unexempted real property of the defendants in accordance with the praecipe attached hereto." (R. 29)

And it will be noted that there is no praecipe attached to the execution and the praecipe was not included in the record, presumably because delivered only to the Sheriff.

Then the Sheriff's return recites that he has:

> "* * * attached and levied upon all the right, title, claim and interest of Kimberly B. McLachlan and Craig McLachlan, defendants, or either of them,

> of, in and to the following described real estate standing on the records of Salt Lake County in the name of Kimberly B. McLachlan and Craig McLachlan * * * [describing the property involved]."

This is not a recital that any property stands in the name of the McLachlans or either of them and the same return on the execution recites that there is to be sold the property described,

> "* * * together with the rights of the vendor in the garage and right of way in the rear or to the north of said premises."

thus indicating that the description was not taken from the County records where the Sellers would have been grantors and not vendors. The Sheriff simply used his printed form and proceeded to sell any interest of the McLachlans under a contract and based on a judgment obtained on that contract.

These two erroneous assumptions made by the Court are fundamental in this case. The Court assumes that title passed to Kimberly B. and Craig McLachlan by reason of election to foreclose and to pass title to somebody, and the Court finds two names on the Sheriff's return of execution and concludes that title was passed to Kimberly and Craig McLachlan. Appellants had sought to raise before this Court the issue of the right to correct a summary judgment so as to avoid litigation over the question of whether title passed and to whom. Because of the

Court's assumptions, the Court did not consider the case in its proper light, namely,

> "Must it now be determined whether title passed, or can the appellants correct the summary judgment in order to avoid litigation for determination of where title reposes and to what extent?"

The Court's opinion treats the matter as though plaintiffs made a mistake in the beginning in electing to pass title and foreclose as though it were a mortgage. This was not the case and not the election and the Court should re-examine its entire opinion for the effect these mistaken assumptions make in the analysis of the entire position of appellants.

Admittedly, the Court could still find that the District Court correctly denied the motion; but before doing that, the Court should appraise the case as it actually arose and with no passage of title except as that might be involved by reason of the entry of a judgment for the balance due. Whether title passed and to whom is not before the Court in this action for adjudication. Appellants simply state the possibility that title passed and to somebody and ask the Court to eliminate that question for the reasons cited in the Brief and referred to in the Court's opinion, reflecting appellant's position that there are involved, in addition to inadvertence, the giving

of additional time to the respondents to perform the contract, avoiding a windfall to defendants and their judgment creditors at the expense of plaintiffs, avoiding a multiplicity of actions, and giving performance of the contract in the manner contemplated by the parties in which Kimberly McLachlan was the buyer and Craig McLachlan was the co-signer or guarantor.

Appellants submit that the Court should grant a re-hearing in this matter so that reconsideration of the entire matter may be had by the Court, with no assumptions as to the passage of title, but title to be considered only in light of the uncertainty that exists as to passage of title where vendors bring an action for the past due installment of a contract, which in this case happens to be the balloon payment at the end of the contract.

Respectfully submitted,

Richard L. Bird Jr.

RICHARD L. BIRD, JR. of
RICHARDS, BIRD & KUMP
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The foregoing Petition for Rehearing was served on the Respondents this 8th day of August, 1977, by mailing true and correct copies thereof, postage prepaid, to David M. Bown and Stephen R. McCaughey, attorneys for Respondents, 321 South 600 East, Salt Lake City, Utah 84102.

Billie Blomquist